RECORD AND BRIEFS

No. 142, Original

Supreme Court, U.S.
FILED
FEB 10 2014
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF FLORIDA'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE A COMPLAINT

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INTRODUCTION

For decades, Georgia has voraciously consumed the shared waters of the Apalachicola-Chattahoochee-Flint ("ACF") Basin without legal constraint. The Apalachicola River has suffered, and an Apalachicola Bay fishery has collapsed – all while Georgia increased consumption, refused to negotiate in good faith, and deployed dilatory legal tactics. Throughout, Georgia always maintained that litigation involving the U.S. Army Corps of Engineers ("Corps") could have no effect on the States' water rights and that this Court was the only appropriate forum to determine those rights. Now faced with an original action, but still seeking delay, Georgia has reversed course and argues this Court should await Corps operational updates before considering Florida's claim. *See* Opposition at 18. But while the Corps can allocate storage in its reservoirs, it cannot adjudicate underlying rights to use that water, and it cannot order Georgia to reduce its consumption. Thus, the Corps cannot address the "same issue" presented by Florida's Complaint. Opposition at 1. Moreover, an equitable apportionment will not interfere with Corps operations.

Georgia also contends Florida has alleged no injury or causation sufficient to support this Court's jurisdiction. Asserting the equities of the Apalachicola region cannot match the dignity ostensibly represented by the City of Atlanta, Georgia argues Florida's injuries are insufficiently serious to warrant this Court's attention. But Florida's case is well pled, and

Georgia's purported factual disputes can only be resolved through adjudication on the merits.

This is the Court to resolve the dispute, and now is the time. Florida has waited long enough.

ARGUMENT

I. THIS IS THE PROPER FORUM AND THE DISPUTE IS RIPE.

Georgia claims because "[n]o water enters the Apalachicola River . . . without passing through the Corps' Woodruff Dam" at the state line, Opposition at 2, the Corps determines how much water Florida receives. Therefore, Georgia argues, the Court should await future Corps decisions before acting. Opposition at 3. This argument ignores not only the clear distinction between impacts from consumption and impacts from Corps operations but also Georgia's own acknowledgements that only this Court can resolve this dispute.

A. As Georgia Has Long Acknowledged, Only an Equitable Apportionment Can Resolve this Dispute.

Although it now conflates the issues of reservoir allocation (which the Corps determines) and the States' underlying water rights (which the Corps cannot determine), Georgia has consistently

acknowledged the two issues are distinct. In 2000, Georgia sued to force the Corps to reallocate Lake Lanier's storage capacity to address municipal and industrial water uses in and around Atlanta. Georgia opposed Florida's intervention, characterizing Florida's interest as "an interest in how much water flows into Florida hundreds of miles downstream," and arguing it was "well settled that states may enforce [such] claims . . . only through a claim for 'equitable apportionment'" in the Supreme Court. Brief of Appellee the State of Georgia at 9, *Georgia v. U.S. Army Corps of Eng'rs* (11th Cir. 2002) (No. 02-10135D). Georgia claimed the case addressed only "[w]hether or not Georgia obtains additional water supply [storage space] from Lake Lanier," *id.*, and could have no effect on Florida's right to water flows at the state line:

> [T]he outcome of this litigation will not affect Georgia's obligation to deliver to Florida its equitable share of the water [of the Chattahoochee River]. The outcome of the litigation may make it easier for Georgia to deliver to Florida its equitable share or harder to deliver to Florida its equitable share, but it will not affect the amount of water Georgia is obligated to deliver to Florida at all.

Id. at 17.

In 2008, while seeking this Court's review of the decision in *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008), Georgia again drew a clear distinction between an action

addressing the Corps' operation of the reservoir system, and one seeking to apportion the waters of the ACF Basin: "How the waters of the ACF should be apportioned between the three states is a question that only this Court, and not the lower courts, can answer in the exercise of its original and exclusive jurisdiction." Petition for Writ of Certiorari at 20, n.14, *Georgia v. Florida*, 555 U.S. 1097 (2009) (No. 08-199). Indeed, Georgia emphasized "whether 'diminished flows' are causing cognizable injuries to Florida's . . . right to an equitable share of water is an issue that only this Court can decide." *Id.*

Yet again, in 2012, in opposing Florida's Petition for Certiorari to the Eleventh Circuit, Georgia asserted the litigation involved issues distinct from the allocation of underlying water rights. The Eleventh Circuit's decision involved the Corps' authority to undertake the very administrative process that Georgia now argues should delay this Court's exercise of jurisdiction. Georgia claimed nothing in that decision "authorizes Georgia to consume more than its fair share of water or precludes Alabama and Florida from bringing an equitable apportionment action to vindicate any rights they may claim to have in the Chattahoochee." Brief in Opposition for the Georgia Respondents at 32-3, *Florida v. Georgia*, 133 S.Ct. 25 (2012) (No. 11-999); *see also id.* ("The Eleventh Circuit's ruling will potentially make it easier for Georgia to utilize the water to which it is entitled, but Florida and Alabama would have no cause for complaint

unless and until Georgia consumed more than its share of the river.").

Now, Georgia characterizes its prior positions as a concession that Florida could bring an equitable action at *some* point, but not before the Corps' process concludes. *See* Opposition at 25 n.14. This contradicts the distinction Georgia made between equitable apportionment and the very same Corps process. Moreover, Georgia undermines even this limited concession by arguing Florida might have no equitable apportionment claim because "the broad scope of the thicket of federal environmental and natural resource statutes" addresses some (but not all) of Florida's injuries. *Id.* at 25. Although unwilling to state it expressly, Georgia suggests that by enacting certain federal statutes, Congress has displaced federal common law regarding equitable apportionment. But the cited cases, *Milwaukee v. Illinois*, 451 U.S. 304 (1981) and *Arizona v. California*, 373 U.S. 546 (1963), belie Georgia's argument. In *Milwaukee*, the Court rejected application of federal common law unless "Congress has not spoken to a particular issue." *Milwaukee*, 451 U.S. at 313. The Court cited *Arizona* as an example where Congress *had* spoken by "exercis[ing] its constitutional power over waters" and addressing the question through a statutory apportionment. *Id.* at 314-15 (quoting *Arizona*, 373 U.S. at 565-66). Neither the Corps' processes nor the laws Georgia cites, *see* Opposition at 21, present a remotely comparable situation. Congress has not displaced this Court's longstanding jurisprudence

regarding Florida's right to an equitable share of the upstream water. *Cf. Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983) (approving use of equitable apportionment in era after passage of federal environmental and natural resource laws).

For more than a decade, Georgia correctly articulated the fundamental distinction between proceedings involving Corps reservoir operations and an equitable apportionment action. Georgia should not now be heard to argue this Court is unavailable to Florida because the Corps continues to evaluate those reservoir operations.

B. The ACF River Basin Master Manual Cannot Resolve this Dispute Because the Corps Does Not Adjudicate Water Rights.

The Corps' updates to its ACF Basin Master Water Control Manual ("Master Manual") will not quantify the States' rights to consume water. Indeed, the Corps has long disclaimed authority to define the States' respective water rights through its Master Manual. In 2005, days before his Senate confirmation as Assistant Secretary of the Army (Civil Works), J.P. Woodley wrote to Alabama Senator Jeff Sessions that updates to water-control plans in the ACF Basin could only affect existing water supply management and were:

> [N]ot intended to address or resolve the issues related to water supply for North Georgia or resolve the water rights issues among the States. *The Corps has no authority to grant water rights or to allocate water among several states*. These Water Control Plans are descriptive guides of current operations and conditions for managing water flows and storage, and not a prescription for allocating water supply. Further, *these updated Water Control Plans will not allocate or reallocate water rights* within the . . . ACF river basin[ ].

Letter from J.P. Woodley to Sen. Jeff Sessions (April 25, 2005) (emphasis supplied). Similarly, Corps representatives explained to Congress just last summer: "The Corps does not have the authority to mandate water conservation measures on the state of Georgia. Allocation of waters for consumptive use is a responsibility of the States." *Oversight of Army Corps of Engineers Water Management in the Apalachicola-Chattahoochee-Flint (ACF) and the Alabama-Coosa-Tallapoosa (ACT) River Systems: Hearing Before the S. Comm. on Environment & Public Works*, 113th Cong. (2013) (Written Responses to Questions for the Record Submitted by Sen. Jeff Sessions (July 22, 2013) (Response to Question 29)) (hereinafter Corps Congressional Responses).

The Solicitor General has articulated the same distinction between the Corps' administrative process and the equitable apportionment Florida now seeks. In opposing Florida's Petition for Certiorari following the Eleventh Circuit's 2011 decision regarding the

Corps' authority to reallocate storage in Lake Lanier, the Solicitor General explained that the Corps' process will never resolve the fundamental question of apportionment:

> Reviewing *this* action, which does not present underlying issues that would be the subject of an original action, would be unlikely to move the overall dispute towards resolution. The Corps does not own the water in the ACF basin. If Florida and Alabama believe that Georgia is using, or storing, more than the equitable share of the waters of the ACF basin to which it is entitled, then their remedy is to pursue a new interstate compact or to seek leave to file an original action in this Court to resolve that issue.

Brief for the Federal Respondents in Opposition at 30, *Florida v. Georgia*, 133 S.Ct. 25 (2012) (No. 11-999).

Florida's Complaint is not about how water flows out of Corps reservoirs; it is about how Georgia's overconsumption leaves less water available to satisfy Florida's needs. Nothing the Corps can do in the context of the Master Manual will address that consumption.[1]

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[1] Conversely, an equitable apportionment will not interfere with the Corps' operational authorities because the Corps remains obligated to observe its statutory duties notwithstanding the level of upstream consumption this Court might approve. This is why the United States is not indispensable to this litigation. The water at issue here is naturally occurring water, unlike the federal project water developed by the U.S. Bureau of

(Continued on following page)

C. Georgia Ignores its Consumption, Which Has Adverse Impacts Distinct from Corps Operations.

Georgia implies the Corps controls all aspects of river flow in the ACF Basin and that Georgia consumption is irrelevant given this supervening management. This is simply incorrect. Indeed, the Corps itself has repeatedly distinguished impacts attributable to its operations from impacts attributable to Georgia's consumption. In a series of biological impact analyses, the Corps has explained how water withdrawals associated with urban and agricultural uses have impacted the flow regime of the Apalachicola River. The Corps made clear that some of the differences in alternative flows regimes "are due to consumptive water uses in the basin rather than Corps reservoir operations" which "impacts basin inflow into the Corps projects." U.S. Army Corps of Engineers, Mobile Dist., BIOLOGICAL ASSESSMENT,

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Reclamation involved in *Arizona v. California*, 298 U.S. 558 (1936). The *Arizona* Court found an apportionment "could not be accomplished without ascertaining the rights of the United States to dispose of that water," *id.* at 571, and without interpreting federal rights and obligations arising under a prior interstate Compact, international treaty obligations, and the federal reserved water rights doctrine. Quantification of such federal rights and obligations is not an issue here and allocating the States' relative rights can only be accomplished in an equitable apportionment action because, unlike the law of the Colorado River, Congress has not created "its own comprehensive scheme for the apportionment of" the ACF Basin waters. *Contrast Arizona*, 373 U.S. at 564-65; *see also supra* at 3.

MODIFICATIONS TO THE INTERIM OPERATING PLAN FOR JIM WOODRUFF DAM AND THE ASSOCIATED RELEASES TO THE APALACHICOLA RIVER at 10 (Feb. 15, 2007), *available at* http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/acf_info/docs/RPM3_FinalBiologicalAssessment_02-16-07.pdf.

Last summer, the Corps acknowledged there have been more periods of low flows in the ACF Basin over the last decade than in previous decades, and concluded that "it is likely that increased consumption, including irrigation on the Flint River, has contributed to the frequency and duration of low flows on the Apalachicola River." Corps Congressional Responses, Response to Question 28. As the Corps previously observed, "an increase in net consumptive depletions to water supply are reasonably certain to occur based on increased municipal and industrial (M&I) demands in the ACF Basin (particularly in the upper Basin) and agricultural withdrawals," and this increase in consumption, "could adversely affect habitat in the Apalachicola River and Apalachicola Bay by further altering the natural flow regime." U.S. Army Corps of Engineers, Mobile Dist., Planning & Envtl. Div., ENVIRONMENTAL ASSESSMENT, INTERIM OPERATIONS PLAN FOR SUPPORT OF ENDANGERED AND THREATENED SPECIES, JIM WOODRUFF DAM, GADSDEN AND JACKSON COUNTIES, FLORIDA AND DECATUR COUNTY, GEORGIA at EA-47 (Oct. 2, 2006), *available at* http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/acf_info/docs/IOPFinalEA.pdf.

There is simply no scientific dispute that upstream uses are depleting flows in the ACF Basin. *See generally* Florida's Brief at 16-20. Georgia minimizes this harm, arguing, for example, that the Atlanta region estimates it will return about 78% of withdrawn water to the Chattahoochee River. Opposition at 12-13. But Georgia ignores entirely its consumption on the Flint River, and, at any rate, Georgia's estimates of return flows on the Chattahoochee and their downstream impacts are hotly debated. Indeed, one estimate shows that during the summer months of dry years, upstream consumption is responsible for depleting *more than 50% of the overall River flow of 5,000 cfs*. U.S. Fish & Wildlife Serv., Panama City Field Office, BIOLOGICAL OPINION ON THE U.S. ARMY CORPS OF ENGINEERS, MOBILE DISTRICT, REVISED INTERIM OPERATING PLAN FOR JIM WOODRUFF DAM AND THE ASSOCIATED RELEASES TO THE APALACHICOLA RIVER at 139 (Table 4.1.A) (May 22, 2012). The precise amount of upstream depletions and downstream impacts cannot be quantified until the completion of discovery. But Florida has pled sufficient facts to entitle it to prove its claims.

II. FLORIDA PROPERLY PLED HARM OF A SERIOUS MAGNITUDE

In determining whether to exercise original jurisdiction, this Court focuses on "the nature of the interest of the complaining State," and in particular the "seriousness and dignity" of the claim asserted. *South Carolina v. North Carolina*, 558 U.S. 256, 277 (2010) (quoting *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992)). As detailed in Florida's Complaint, no issue is of greater import to the people of the ACF Basin, and the Apalachicola region in particular, than the waters that sustain them.

Under the Federal Rules of Civil Procedure, which provide guidance in this case, a Complaint need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Court must accept as true all well-pled factual allegations contained in the Complaint, and the Complaint must state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Florida's Complaint contains sufficient factual content to "allow[] the Court to draw the reasonable inference" that Georgia is responsible for Florida's harm. *Iqbal*, 556 U.S. at 678. Florida has pled detailed facts regarding the low flows in the Apalachicola and the resulting harm, *e.g.*, Complt. ¶¶ 55-56, 58, Georgia's overconsumption, *e.g.*, *id.* ¶¶ 48-50, and the causal relationship between the two, *e.g.*, *id.* ¶¶ 53-54, 57.

Georgia's Opposition simply ignores that the Complaint's factual allegations must be accepted as true and invites the Court to prejudge disputed facts. Moreover, Georgia asserts Florida must ultimately prove injury by clear and convincing evidence, downplaying Florida's allegations of injury. Opposition at 15, 28, 31 n.19. But Georgia fails to cite a single case establishing that an evidentiary standard alters the pleading standard. *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (reversing dismissal of employment discrimination complaint based on failure to allege elements for prima facie case because "[t]he prima facie case under *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 792 (1973)] is an evidentiary standard, not a pleading requirement" (cited in *Twombly*, 550 U.S. at 569-70)).

Florida has alleged serious injury to its economy, its environment, and its people – not simply to threatened or endangered species as Georgia suggests. Florida has alleged the same types of injuries that have justified the exercise of this Court's jurisdiction in past proceedings. *See, e.g., Nebraska v. Wyoming,* 515 U.S. 1 (1995); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983); *New Jersey v. New York*, 283 U.S. 336 (1931).

CONCLUSION

Georgia alone is responsible for its unrelenting consumption of interstate waters and this Court is the only forum in which Florida may seek redress. This Court should, therefore, grant Florida leave to file its Complaint and appoint a Special Master to conduct further proceedings.

Respectfully submitted,

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